In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 474

PETE JONES,
Petitioner,

vs.

JAMES H. PATTERSON, United States Marshal for the Territory of Alaska, Third Division, and OSCAR OLSON, Deputy United States Marshal for the Territory of Alaska, Third Division,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

GEORGE B. GRIGSBY,
Anchorage, Alaska,
Attorney for Petitioner.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Pete Jones, prays that a writ of certiorari issue to review the judgment entered on June 22, 1944, in the United States Circuit Court of Appeals for the Ninth Circuit in case No. 10536, entitled James H. Patterson, et al., Appellants, v. Pete Jones, Appellee. (R. 84.)

JURISDICTION.

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240, Judicial Code, 28 U.S.C.A., Section 347.

OPINIONS AND JUDGMENTS BELOW.

The judgment of the trial Court was entered on November 5, 1942. (R. 17.)

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, on the motion to dismiss appeal, dated February 25, 1944, is reported in 141 Fed. (2d) page 319. (R. 70.)

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit on the merits is reported in ..... Fed. (2d) ..... (R. 78.)

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit, dated June 22, 1944. (R. 84.)

SUMMARY STATEMENT.

On October 15, 1942, the petitioner, Pete Jones, was convicted in the United States Commissioner's Court for the Precinct of Anchorage, Alaska, of the crime of maintaining a gambling house in violation of Section 4985 of the Compiled Laws of Alaska, 1933, and sentenced to serve a term of six months in the Federal jail. On October 17, 1942, the petitioner applied for a writ of habeas corpus in the District Court for the Territory of Alaska, alleging as grounds for his discharge that the statute, by virtue of which he was convicted, was void as being in conflict with Section 9 of the Organic Act of Alaska. (48 U.S.C.A. 77.)

On November 5, 1942, the District Court rendered judgment discharging the petitioner (R. 17) from which judgment the respondents appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The judgment was reversed.

Appellant and petitioner, Pete Jones, moved to dismiss the appeal on the ground of laches of the United States Attorney in prosecuting the appeal, and other grounds. (R. 65.) The motion was denied. (R. 69.) The statutes involved in the habeas corpus proceeding are not set forth herein, as they are not material to this petition.

On the hearing in the Circuit Court of Appeals on this motion, it was contended by appellee that appellants' application for an appeal was not timely and that consequently the District Court lost jurisdiction to allow the appeal and that the Appellate Court was without jurisdiction to entertain it. (Opinion of Circuit Court of Appeals R. 73.)

As stated above, the judgment appealed from was rendered November 5, 1942.

The petition for appeal was filed on January 29, 1943, with the Clerk of the District Court of the Third Division, at Anchorage, Alaska, but was not presented for allowance to the trial judge until March 24, 1943, more than four months after the rendition of judgment and more than one month after the expiration of the appeal period. (R. 25.)

The order allowing appeal was finally made on April 13, 1943, more than two months after the expiration of the appeal period.

However, the appellants did present the petition for appeal to the Judge of the Fourth Judicial Division of Alaska, at Fairbanks, Alaska, on February 2, 1942, and within the ninety-day appeal period (R. 23), which was in effect denied by him.

On July 24, 1943, one hundred and two days after the allowance of appeal, which was on April 13, 1943, appellants filed their Praecipe for Transcript of Record. (R. 55.)

Meanwhile and thereafter five extensions of time, two by the trial Court and three by the U. S. Circuit

Court of Appeals for the Ninth Circuit, were granted to appellants to docket the case in the Appellate Court. Four of these extensions were granted before the Praecipe for Transcript of Record was filed. It was docketed October 19, 1943. (R. 73.)

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED.

1. The Circuit Court of Appeals has rendered a decision in conflict with the decision of other Circuit Courts of Appeals involving the same matter, viz: the construction of Section 230, Title 28, U. S. Code Annotated.

2. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The first ground assigned involves construction of Section 230, Title 28, United States Code Annotated, which provides:

> "Sec. 230. Time for making application for appeal. No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

The second ground assigned relates to laches of the United States Attorney in prosecuting the appeal.

SUMMARY OF ARGUMENT.

1.

JURISDICTION.

The District Court of Alaska was without jurisdiction to allow the appeal and the Circuit Court of Appeals without jurisdiction to entertain it.

This contention is based entirely upon the fact that the appellants' petition for appeal was not presented to the judge who allowed it until long after the ninety-day period within which an appeal could be taken had expired.

2.

ATTEMPT OF CIRCUIT COURT OF APPEALS TO DISTINGUISH THE INSTANT CASE BASED ON ERRONEOUS ASSUMPTION OF FACT.

The Circuit Court of Appeals attempted to distinguish the instant case on the ground that at the time the Petition for Appeal was filed in the office of the clerk of the Court, the judge of the Court was out of the jursidiction and could not be reached, whereas in truth and in fact, as the record shows, the judge was at all times within the jurisdiction and available.

LACHES.

1. **The United States Attorney guilty of inexcusable delay in the prosecution of the appeal.**
2. **Laches not cured by orders of Court extending time to docket case.**

ARGUMENT.

JURISDICTION.

The contention of petitioner that the trial Court was without jurisdiction to entertain the appeal and the Circuit Court of Appeals without jurisdiction to entertain it is based upon the contention that an application for an appeal is not *duly made* within the meaning of Section 230, U.S.C.A., unless not only filed but *actually presented* to the judge who allows it, within three months after entry of judgment or decree.

In the instant case, the Circuit Court of Appeals concludes its opinion with the following express conclusion:

> "(1) We hold that the application for leave to appeal in this case was filed with the clerk of the District Court for the Third Division within the statutory ninety-day period, and the allowance of the appeal thereafter was not error."

Shortly subsequent to its decision in *Matton Steamboat Co., Inc. et al., v. Murphy* (319 U. S. 412), June 1, 1943, this Court amended Subdivision I of Rule 36, of the rules of this Court to read as follows:

> "1. An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the judge or justice who allows it. A prior timely application to another judge or justice does not extend the statutory period. See Matton Steamboat Co. v. Murphy, 319 U. S. ..... * * *"

Thus the Supreme Court based the aforesaid amendment to its rules on the decision in the *Matton Steamboat Co.* case, and incorporated in the amendment a citation to the case.

In its decision in the above-mentioned case, this Court says (*per curiam*):

> "On application to an Associate Justice of this court, *made shortly after the three months period expired,* the appeals were allowed by him, in order that we might resolve an unsettled question of our practice * * *"

Then follows an opinion, which concludes with a dismissal of the appeals.

Petitioner cites the *Matton Steamboat Co.* case, supra, and the amendment to the Rules of the Supreme Court, based thereon, to support his contention. That decision and the accompanying amendment of Rules, is the culmination of a long line of unanimous authority to the same effect. The supporting authority is now cited, not to establish the principle already shown to be established, but to present the conflict between the decision of the Court of Appeals in the instant case, and the decisions of other Circuit Courts of Appeals on the same matter, the conflict necessary to be shown in order to invoke the jurisdiction of this Court.

On the motion to dismiss the appeal, the appellee, now petitioner, cited, *Baez v. People of Puerto Rico,* 82 Fed. (2d) 317.

Because the Circuit Court of Appeals, in its opinion on the motion to dismiss the appeal, attempted to distinguish the *Baez* case, we quote therefrom as follows:

> "The filing of an application for an appeal *in the office of the clerk* of the court where the judgment or decree is entered will not be regarded as an application 'duly made' under Section 230, so as to stop the running of the statute, *unless it be* where the sole judge of that court or all of the judges are out of the jurisdiction, or incapacitated, so that an application cannot be made to a judge of that court within the three months' period. Where the sole judge, or all the judges of the court in which the judgment or decree is entered are out of the jurisdiction, or incapacitated, the filing of the application for appeal in the office of the clerk within three months from the entry of judgment or decree will not be permitted to defeat the right of the appellant."

The language of the Court in the *Baez* case, above quoted, is expressly approved in *Benitez v. Bank of Nova Scotia,* 109 Fed. (2d) 743(6).

In *Von Holt v. Carter,* 56 Fed. (2d) 61, the Ninth Circuit, itself, states:

> "The facts herein bring this case squarely under the rule laid down by the Circuit Court of Appeals for the Sixth Circuit in the case of Ross v. White, 32 Fed. (2d) 751. That case is so exhaustive in its citations of authorities discussing the question here involved, and is so well reasoned, that any repetition here of the points there considered would be superfluous. It is clear that the mere

filing of a petition for appeal in the Clerk's office, *even though addressed to the Court,* is of no avail, unless accompanied by an allowance of an appeal by the Court, and cannot be considered an application 'duly made' within the language of the statute which in terms refers to an 'allowance.'"

See also:

U. S. v. New Natl. Coal & Mining Co., 72 Fed. (2d) 168;

U. S. v. Vigil, 10 Wall. 423;

Cardona v. Quinones, 240 U. S. 83.

ATTEMPT OF CIRCUIT COURT OF APPEALS TO DISTINGUISH CASE.

In its opinion denying the motion to dismiss, the Circuit Court of Appeals attempted to distinguish the *Baez* case, supra, as follows:

> "We distinguish the Baez case from the case at bar. *In the instant case the judge to whom the application should have been presented was out of the jurisdiction* and could not be reached though diligent effort was made by the appellants to do so within the statutory period." (R. 75.) (Italics ours.)

The statement in the opinion just quoted with reference to the judge being out of the jurisdiction is utterly without foundation. Nowhere in the record does it appear that the judge of the Third Division was out of the jurisdiction. On the contrary, it affirm-

atively appears that at all times involved he was within the jurisdiction.

That when not in the Third Division of the Court, he was in the First Division, at Juneau, Alaska, and within his jurisdiction. (Opinion, R. 72; Affidavit of Noel K. Wennblom, R. 31.)

There are four divisions of the District Court for the Territory of Alaska. (Compiled Laws of Alaska, 1933, Sec. 1091.)

The jurisdiction of each Division of the Court shall extend over the Territory of Alaska. (Compiled Laws of Alaska, 1933, Sec. 1093.)

It was neither contended by the appellant nor suggested by the Court of Appeals, in its opinion, that Judge Hellenthal was incapacitated.

It is, however, shown by the affidavit of Noel K. Wennblom (R. 30-35), that an effort was made to get the appeal papers by mail to Judge Hellenthal, then at Juneau, Alaska, within his jurisdiction, otherwise he could not have acted, but that this effort was rendered futile by inclement weather; but it is not contended that this situation rendered Judge Hellenthal incapacitated, within the meaning of Section 230, U. S. Code. The situation is analogous to that where the presentation of a Bill of Exceptions is involved.

> "The absence of the trial judge from the district is not a disability within the meaning of the statute, so as to allow the bill to be allowed and signed by another judge who is within the district, and where a bill is signed by one who was

not the trial judge, he should in doing so expressly state in his certificate the reason why he, and not the trial judge, allowed and signed the bill, and such power depends upon the death, sickness or disability of the judge who tried the case."

Ulmer et al. v. U. S., 266 Fed. 176;
Kreiner v. U. S., 11 Fed. (2d) 22, 23;
Norwood v. U. S., 18 Fed. (2d) 577.

Conceding that in the case of settling Bills of Exceptions more cogent reasons exist that the presentation be made to the trial judge than in the allowance of appeals, yet the identical principle is involved. The Circuit Court of Appeals recognizes the principle in attempting to distinguish the *Baez* case (R. 75), on the mistaken assumption that Judge Hellenthal of the Third Division "was out of the jurisdiction and could not be reached".

It would be a dangerous precedent to stretch the meaning of the word "incapacitated" to apply to the situation in the instant case, as the circumstances present no reason for a departure from a strict construction of Section 230. The judgment appealed from was rendered November 5, 1942. The U. S. Attorney had ninety days in which to file and present a petition for an appeal. He waited until the 85th day to file his petition. This was an habeas corpus proceeding. It was incumbent on the U. S. Attorney to act promptly. The trial judge was available at Anchorage, Alaska, until January 10, 1943. He was thereafter at all times available by mail or telegraph

at Juneau, Alaska. The U. S. Attorney waited until the 85th day and then sought to reach the judge by mail. He could have been reached by wire and the appeal allowed by wire; the presentation at least could have been made by wire. It cannot be an abuse of "judicial notice" for this Court to assume that adequate telegraph facilities existed at Anchorage and Juneau, Alaska, although it might be carrying it too far to credit this Court with knowledge that the U. S. Signal Corps occupies a large part of the Federal Buildings at both places, handles hundreds of telegrams daily, commercial and official, and at Anchorage is but a few steps from the U. S. Attorney's office.

In *Von Holt v. Carter,* supra, 56 Fed. (2d) 63, the analogy of the situation to that where the presentation of a Bill of Exceptions is involved is again illustrated, the Court of the Ninth Circuit saying:

> "It seems to us to be too clear to require argument that the judge contemplated by the statute, to whom the presentation of a bill of exceptions is to be made, is the one who presided at the trial and not any of his associates; and likewise that *the presentation must be to the judge himself and not to the clerk of the court or to any other official.* We do not mean to be understood as holding that a delivery to the clerk may not under any circumstances suffice. It may be, for example, that if the appellant within the time provided by law calls the judge's attention to the fact that he has ready his bill of exceptions and if the judge thereupon directs manual delivery to the clerk, this would constitute a presentation to the judge within the meaning of the statute, etc."

So, in the instant case, if the U. S. Attorney had in any way, by mail, wire, telephone, or radio broadcast, informed Judge Hellenthal that his petition for appeal was filed and pending, and the judge had responded, "appeal allowed", or "will act upon my return", at least the statute would have been tolled. The U. S. Attorney seems to have realized the necessity of a presentation, and to realize now the necessity of a showing that he did his utmost to effect one.

A succinct statement of his efforts in that direction and their culmination is set forth on page 74 of the Record. (Opinion of C.C.A., 141 Fed. (2d) 320.) As there stated by the Circuit Court of Appeals:

> "Thereupon the matter was presented to Judge Pratt of the Fourth Division within the three months' period allowed by the Code, who, *deeming it unnecessary for a judge of another division to sign the application,* assigned the cause to the Third Division." (Italics ours.)

The legal effect of the presentation of Judge Pratt of the Fourth Division is not discussed in the opinion of the Circuit Court of Appeals. Lest that question might suggest itself to this Court, it will be discussed in concluding this branch of the argument.

The opinion of the Circuit Court of Appeals after the statement last above quoted proceeds as follows:

> "In Steffler v. United States, 319 U. S. 38, 40, in a *per curiam* opinion, the Court stated:
>
> '* * * But petitioner's filing of a motion for leave to appeal with the clerk of the district court was a sufficient application, in view of

> the fact that an appeal may be allowed by either the district court or the district judge * * *.' "
>
> (R. 74; 141 Fed. (2d) 320.)

The Court of Appeals then holds that *Matton Steamboat Co. v. Murphy,* supra, is not in point, stating (same page):

> "The question of whether filing of a petition for leave to appeal with the clerk of a district court is a sufficient application, either in the absence of the judge or otherwise, was not before the Court in that case."

The Court overlooked the fact that appellee, now petitioner, relied upon the *Matton Steamboat Co.* case to support the contention that there must be a *presentation* to the Court or judge to constitute an application *duly made;* overlooked the fact that all decisions of Circuit Courts of Appeals and the Supreme Court have affirmed and reaffirmed the doctrine that the petition must not only be filed, *but presented* to a Court or judge within the statutory time; and further ignored the fact that the Supreme Court, after the decision in the *Steffler* case, by amendment to its rules adopted the rule in the *Matton Steamboat Co.* case, as controlling.

The Circuit Court of Appeals not only disregards every other decision except the *Steffler* case, but after reviewing the cases cited by appellee, including the *Matton Steamboat Co.* case and the *Baez* case, concludes:

> "Suffice it to say that none of these cases overcome the force and effect which we must accord to the decision of the Supreme Court in Steffler v. United States, supra—
>
> "(1) We hold that the application for leave to appeal the case was filed with the clerk of the District Court for the Third Division within the statutory ninety-day period, and the allowance of the appeal was not error."

A very brief discussion of the *Steffler* case will suffice to demonstrate that the Supreme Court did not intend by that decision to reverse the long line of uniform decisions to the contrary. In that case this Court says (319 U. S. 39):

> "It is evident on the face of the papers that petitioner has been unable to prosecute an appeal or secure appellate review by reason of the refusal of the District Court to entertain his application to appeal in forma pauperis * * *"

Certainly this language implies a presentation of the application for appeal to a court or judge.

In the *Steffler* case (319 U. S. 40) this Court cites *Ex parte Railroad Company,* 95 U. S. 221, 227, and *Alaska Packers Association v. Pillsbury,* 301 U. S. 174, 175, 176, as supporting its decision. After a careful examination of the former case, we have been unable to see its application. The latter case, the *Alaska Packers* case, does not support the opinion in the *Steffler* case, but asserts the contrary doctrine and supports the position of petitioner, as a brief examination of the case will show.

The language of this Court in the opinion in the *Steffler* case, quoted above, must be construed to apply to that particular case only, a case where the application was for leave to appeal *in forma pauperis,* otherwise it upsets every decision of the Circuit Courts of Appeals and the Supreme Court, before and after its rendition.

In the opinion of the Appellate Court on appellee's motion to dismiss the appeal, there is no comment on the legal effect of the presentation of the appeal papers to Judge Pratt of the Fourth Division of the District Court for the Territory of Alaska.

The appeal papers were presented to Judge Pratt on February 2, 1943, and within the appeal period. Undoubtedly he had jurisdiction to allow the appeal, being within the jurisdiction. (Likewise, Judge Hellenthal was within the jurisdiction, being at Juneau, in the First Division.) Judge Pratt refused to act and entered an order referring the matter back to the Third Division, erroneously holding that:

> "Section 230, Title 28, U.S.C.A., regulating the time within which appeals may be taken from a judgment to the Circuit Court of Appeals, has been complied with by said petitioners for appeal and that it is unnecessary for the petition to be acted upon by any judge in Alaska within three months of said judgment and that a delay in granting the appeal, occasioned by the absence of Judge Hellenthal from his division, will not prejudice said petitioners in their appeal." (R. 42, 72.)

Judge Pratt could have allowed the appeal. He refused to act. The papers could have been filed in his Court and mandamus proceedings instituted. The statute would thereby have been tolled.

Taylor v. Thompson, 122 N. E. 655;
Boone v. District Court, 224 Pac. 429;
Other cases cited in note to *State ex rel. Musselshell Co. v. District Court,* 42 A. L. R. 1164-1167.

In *Taylor v. Thompson,* supra, the Court stated that it is

> "a familiar principle that the writ of mandamus may be used to set in motion the jurisdictional activity of a judicial officer to the end that a decision shall be reached *whenever he refuses for any reason* (italics ours) to exercise his power."

In the circumstances, the instant case falls squarely within the rule laid down in the *Matton Steamboat Co.* case, supra, which emphatically states:

> "But when the Chief Justice of the Court of Appeals denied appellants' applications and disallowed the appeals, the applications *were no longer pending before him,* and at least *in the absence of any reconsideration by him,* appeals could be allowed only on a new application either to him or to a justice of this court * * *
>
> "No appeal shall be allowed unless application be made within three months. An application made within that period and denied does not satisfy that requirement, nor does a later application filed after the time limit has expired, *even though it is allowed.*" (Italics ours.)

So in the instant case, when Judge Pratt of the Fourth Division refused to act and referred the petition back to the Third Division the application was *no longer pending before him* and the later presentation to Judge Hellenthal in the Third Division after the time limit had expired did not satisfy the statutory requirement.

Concluding this branch of the argument, which is directed to the attempt of the Appellate Court to distinguish the case, we have only to say that the general effect of the decision of the Appellate Court to retain jurisdiction is not that the instant case is distinguished, but that the *Steffler* case, supra, announces the true rule; and this because, after reviewing the cases cited by appellee, including the *Matton Steamboat Co.* case, supra, the Appellate Court says:

> "Suffice it to say that none of these cases overcome the force and effect which we must accord to the decision of the Supreme Court in Steffler v. United States, supra."

LACHES.

LACHES OF DISTRICT ATTORNEY IN PROSECUTING THE APPEAL.

It is in failing to properly apply the principles applicable to laches, that we contend that the Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings *and* sanctioned such a departure by a lower Court.

This is a habeas corpus proceeding.

> "Substantial justice, *promptly administered,* is ever the rule in habeas corpus." (Italics ours.)
>
> *Luigi Storti v. Commonwealth of Massachusetts,* 183 U. S. 143.

Quoting further from the *Storti* case, this Court, speaking through Justice Brewer, said:

> "We do not question that rule as applied to ordinary suits and actions, but Sec. 761, Rev. Statutes, provides as to habeas corpus cases that 'the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party AS law and justice require.' That mandate is applicable to this court, whether it is exercising its original or appellate jurisdiction. Proceedings in habeas corpus are to be disposed of in a summary way. *The interests of both the public and the petitioner require promptness;* that if he is unlawfully restrained of his liberty it may be given to him as *speedily* as possible; that if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that if further action is to be taken in the matter it may be taken *without delay.* Especially is this true when the habeas corpus proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. *This matter of promptness is not peculiar in these cases in Federal courts, but is the general rule which obtains wherever the common law is in force.*

"It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both state and Federal.

"The command of the section is 'to dispose of the party as law and justice require'. All the freedom of equity procedure is thus prescribed, and substantial justice, *promptly administered,* is ever the rule in habeas corpus." (Italics ours.)

In *Roberts v. Reilly,* 116 U. S. 80, this Court, discussing Section 765 R. S., said:

"This statutory provision evidently contemplates the summary character of the proceeding under the writ of habeas corpus as not admitting, in favor of the liberty of the citizen, the delays usually and necessarily attending ordinary litigations between parties, and confers upon the judicial tribunal, or the judge hearing the application and making the order which is the subject of the appeal, discretion to send up the case to the appellate tribunal, under such rules and regulations as may seem best adapted to secure the *speediest* and most effective justice." (Italics ours.)

In *Bryan v. Fumio Arai,* 64 Fed. (2d) 956, the Ninth Circuit, in sustaining a rule of the District Court of the Territory of Hawaii, limiting the time for taking an appeal in habeas corpus proceedings, said:

"Inasmuch as the provisions of Rev. St. Sec. 765 (28 U.S.C.A. Sec. 464) are specially designed with reference to the character of habeas corpus (see Roberts v. Reilly, 116 U. S. 80, 92), an intent to repeal this section cannot fairly be imputed to Congress.

> "Appellant also urges that even if Rev. St. Sec. 765, is still effective, fairly interpreted it does not authorize rules limiting the time for appeal. In view of the opinion in Roberts v. Reilly, at pages 92, 93 of 116 U. S., we deem this contention without merit."

As stated by Justice Brewer, supra, "This matter of promptness is the general rule, in habeas corpus proceedings", and that the rule applies to the Courts as well as to the parties.

This rule of promptness, established by judicial decisions, has been extended to all cases by the new Federal Rules of Civil Procedure.

The Preamble to the Rules of the United States Circuit Court of Appeals for the Ninth Circuit is as follows:

> "The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this court with respect to appeals in actions of a civil nature."

While the Federal Rules of Civil Procedure have not been extended to Alaska, and the old practice prevails concerning petition for allowance of appeal, etc., the Ninth Circuit has adopted them, whenever applicable, and including Alaska procedure.

In the Manual of Federal Appellate Procedure, Third Edition, 1941 of Paul P. O'Brien, Clerk of the U. S. Court of Appeals of the Ninth Circuit, pages 123-158 cover instructions concerning appeals from District Courts of Alaska. According to these instruc-

tions, Rules 75, 73(a) are applicable (page 133), and are as follows:

> "(a) Designation of Contents of Record on Appeal.
>
> "*Promptly* (italics ours) after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. * * *
>
> "Rule 73 (a). When an appeal is permitted by law from a District Court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule, or when no remedy is specified, *for such action as the appellate court deems appropriate.*" (Italics ours.)

In *U. S. ex rel. Rempas v. Schlotfeldt,* 123 Fed. (2d) 109, the purpose of the rules is stated to be "to expedite and simplify the practice and procedure".

In *Miller v. United States,* 117 Fed. (2d) 258, the opinion states, "It was the purpose of these rules to *expedite appeals and guard against dilatory tactics.*" (Italics ours.)

The latter case involved a civil claim, and the Court refused to dismiss the appeal because the delay in docketing the same was found to be highly excusable.

In the *Rempas* case, supra, the appeal had not been docketed within the time prescribed by the rules. The Court (7th Circuit) allowed the appeal to be docketed after time, and then sustained a motion to dismiss the appeal, stating in its opinion:

> "The rules of procedure were intended to expedite and simplify the practice and procedure. Ample provision is made in the rules to relieve against hardship and excusable neglect. There is no room for *inexcusable neglect and long delay,* and when both appear, as in this case, it seems to us a good time to indicate that the rules of this Court and of the Code of Civil Procedure have some meaning and purpose. Appeal dismissed." (Italics ours.)

The *Rempas* case is on all fours with the instant case. The petition for the writ of habeas corpus was granted, the petitioner discharged and the case docketed out of time.

It has now been demonstrated that the uniform decisions of the Courts have established the rule of speed and promptness in habeas corpus proceedings.

That the Federal Rules of Civil Procedure are designed to effect the same purpose in all cases.

There now remains to be considered the effect of the five extensions of time granted appellants to docket their appeal.

LACHES NOT CURED BY ORDERS OF COURT EXTENDING TIME TO DOCKET CASE.

The Circuit Court of Appeals summarily disposes of the claim of laches as follows:

> "As to the claim of laches, the several extensions of time granted appellants by the court were upon proper showing and appellee's case was not prejudiced thereby." (R. 76, 141 Fed. (2d) 321.)

As in its conclusions respecting the question of jurisdiction, the Circuit Court of Appeals again bases its decision on a false premise.

The several extensions of time granted appellants to docket the case were *not* upon proper showing, and all but one were upon no showing. In that one, the showing was untrue.

Of course, the usual formal recital, "and good cause therefor appearing" occurs in the orders of extension.

On principle and authority appellee's rights to a speedy determination of his case were not foreclosed by a mere formal recital in an order improvidently granted. No doubt if the Circuit Court of Appeals had determined that they had improvidently granted the orders *without* good cause therefor appearing, the appeal would have been dismissed.

Petitioner contends that his claim of laches was brushed away without due consideration by the Appellate Court.

There were five extensions of time to docket the case, two by the District Court and three by the Court of Appeals.

They were respectively dated:
June 3, 1943 (R. 45, by the District Court);
July 14, 1943 (R. 52, by the District Court);
May 21, 1943 (R. 47, by Circuit Court of Appeals);
June 30, 1943 (R. 48, by Circuit Court of Appeals);
August 2, 1943 (R. 57, by Circuit Court of Appeals).

All but the last of these extensions were granted *before* the U. S. Attorney had even filed a Praecipe for Transcript of the Record. The first extension was granted May 21, 1943, thirty-eight days after the appeal was allowed.

The appeal was allowed April 13, 1943.

The Praecipe for Transcript of Record was filed July 24, 1943, One Hundred and Two days after the appeal was allowed. (R. 56.)

Customarily, where it is necessary to have transcribed a long record of a trial, to settle a Bill of Exceptions condensed therefrom, and thereafter to procure the clerk's transcript, an extension, or several, is granted almost as of course.

But here there was no testimony, the judgment was on demurrer, there was no Bill of Exceptions, the record was short.

From April 13, 1943 until May 10, 1943, the U. S. Attorney had two Assistant U. S. Attorneys in his office at Anchorage, Alaska. After that and until June 14, 1943, he had one assistant. (R. 68.)

During the entire period he had two stenographers.

During the entire period the Clerk of the Court with a large staff of deputies was available at all

times. See affidavit of George B. Grigsby, R. 68. Yet the U. S. Attorney waited 102 days to file his Praecipe for the Transcript.

Meanwhile, because of this inexcusable delay, and not in extenuation thereof, extensions of time became necessary. There is no showing of record for the extensions granted by the District Court of Alaska.

The applications for extensions to the Circuit Court of Appeals are in the Record. (R. 62-63-64.)

The first, a telegraphic request, is dated May 21, 1943 (R. 62) and is as follows:

> "To Paul O'Brien, Clerk United States Circuit Court of Appeals, San Francisco, California.
>
> "Reference U. S. vs. Pete Jones and H. B. Ogle numbers A3007 and A3008. United States Attorney Wennblom, Anchorage, Alaska. Reports difficulty preparing transcript record within time and requests extension to and including July first for docketing cases in your court. Please take necessary action and advise Wennblom direct by wire.
>
> Wendell Berge,
> Assistant Attorney General."

This request, it is admitted, was enough; the "good cause appearing therefor" sufficiently appeared, taking the contents of the telegram as true, to warrant an extension of time by the Circuit Court of Appeals.

But the showing was based upon information from U. S. Attorney Wennblom which was absolutely contrary to fact.

No "difficulty in preparing transcript of record within time" existed.

The full record had reposed in the clerk's office for 38 days after the appeal was allowed. The U. S. Attorney had not filed his Praecipe for the Transcript.

And after this first telegraphic request of May 21st has been granted, the U. S. Attorney delays another 64 days before filing his Praecipe, meanwhile procuring two further extensions from the District Court and a second extension from the Circuit Court of Appeals, and after filing the Praecipe, another from the latter Court, all based on no showing whatever, except presumably on the strength of the first application.

The last application, dated July 31st (R. 63), is fortified by the language in the telegram:

> "Department approves extension to September first 1943." (R. 63.)

We submit that no reason appears in the record, nor exists, nor can be conceived, warranting a delay of 102 days in filing a Praecipe, the U. S. Attorney's office being fully equipped with assistants and stenographers and the Clerk of the Court open with an adequate force at all times. (R. 68.)

If any such reason existed, the U. S. Attorney could have so shown in opposition to the showing made by the appellee. (R. 67, 68.)

That he did not do so leaves the inescapable conclusion that he was purposely using dilatory tactics.

The Circuit Court of Appeals cannot be criticized for granting the first extension, particularly in view

of the high source from which the application emanated, nor perhaps for the subsequent extensions. It is perhaps to be presumed that the office of Atorney General of the United States would not knowingly impose upon a United States Court in which it represents a litigant. But in its last request for extension, speaking through Wendell Berge, Assistant Attorney General, it adds the words "department approves extension", we cannot refrain from wondering what would have been the action of the Appellate Court if Pete Jones, the petitioner, had been the appellant and wiring the Court for an extension of time to docket his appeal had concluded with, "My attorney approves extension".

It cannot but appear that the Attorney General's office presumed a little on official prestige.

It is the contention of petitioner that, notwithstanding the orders of the Circuit Court of Appeals granting the extensions, "good cause therefor appearing", neither the Appellate Court nor the appellee were bound by such recital, and immediately upon the discovery by that Court of the imposition practiced by the United States Attorney, revealing false statements as the basis for the applications, and showing conclusively that the applications were ill-founded, it became their duty to dismiss the appeals of their own motion and indicate, as in the *Rempas* case, supra, that the "Rules of Court and of the Code of Civil Procedure have some meaning and purpose".

See also *Greene v. Hulse,* 33 Fed. (2d) 121, to the following effect:

> "Motion to vacate an ex parte order dismissing appeal will be denied, where appellant delayed more than two months after notice to move for leave to lodge and file statement and praecipe required by Equity Rule 75, and where to vacate dismissal would defer hearing unseasonably." (Syllabus.)

We contend that an ill-founded telegraphic application of the Attorney General does not justify a suspension of the Rules of Court, supposedly applicable to all litigants.

Rule 13 of the Rules of the Ninth Circuit is as follows:

> Rule 13: Extension of Time to File Record.
>
> "*For good cause shown,* any judge of this court may enlarge the time to file the transcript of record * * *"

And in the Manual of Federal Appellate Procedure of the Clerk of Court of the Ninth Circuit, presumably authorized by the Court (1941 Ed. p. 125, paragraph 15) is the following:

> "If the clerk of the trial court is unable to prepare and file the transcript of record with the clerk of the Appellate Court within the time fixed by the citation, an order should be obtained from the trial court or a judge of the Appellate Court extending the time for filing of the record and docketing the case in the Appellate Court * * *
>
> "An application for an extension of time should be *supported by affidavit* of counsel indicating reasons for the extension asked for." (Italics ours.)

In the opinion disposing of the claim of laches, as before stated, the Appellate Court said (141 Fed. (2d) 321; R. 76):

> "As to the claim of laches, the several extensions granted appellants by the court were upon proper showing and *appellee's case was not prejudiced thereby.*" (Italics ours.)

True, appellee's *case* may not have been prejudiced. But the appellee himself has been necessarily and presumptively prejudiced and the public likewise, as stated by Justice Brewer in *Storti v. Commonwealth of Massachusetts,* supra, as follows:

> "*The interest of both the public and the petitioner require promptness;* that if he is unlawfully restrained of his liberty it may be given to him as *speedily* as possible, that if not, all having any thing to do with his restraint be advised thereof, and the mind of the public to put to rest, and also that if further action is to be taken in the matter it may be taken *without delay.*" (Italics ours.)

That the appellee was discharged and at liberty cannot alter the principle. As stated in the opinion, 141 Fed. (2d) 320, R. 73:

> "On April 29, 1943, Judge Hellenthal signed the Citation on an appeal * * *. On July 24, 1943, appellants filed their Praecipe for Transcript of Record, and after several extensions of time granted by the court, the transcript of record was filed with this Court October 19, 1943. Appellants' brief was filed December 13, 1943, after extension of time pursuant to motion."

The appellee was discharged by the judgment of the lower Court on November 5, 1942. From the filing of the petition for appeal, January 29, 1943, to the date of judgment of the Appellate Court, June 22, 1944, the possibility of a reversal and consequent imprisonment has impended over him, inevitably affecting the conduct of his personal affairs, plans for the future, and peace of mind. He cannot complain of legitimate and necessary delays incidental to all appeals. He does complain of unnecessary and inexcusable delay and procrastination. He was entitled to the benefit of the law impelling speed and promptness in habeas corpus proceedings, and the rules of Court impelling the same in all appellate proceedings. He was presumptively prejudiced in being denied those benefits, on the same principle of the denial to a defendant of a speedy trial.

As a result of the unseasonable and inexcusable delays hereinbefore detailed, the case was not docketed in the Appellate Court until October 19, 1943, the brief of appellant's was not filed until December 13, 1943, and then after another extension of time.

Promptly thereafter, on December 17, the appellee served upon the appellant's counsel the motion to dismiss the appeal, which was heard by the Appellate Court on January 17, 1944.

It was decided and denied February 25, 1944. (R. 73, 74.)

The case was argued on the merits on April ...., 1944, and decided and reversed on June 22, 1944.

The appellee has been without fault throughout the proceedings. He was not the moving party. He had the perfect right to endeavor to sustain the judgment in his favor of the lower Court.

Had the United States Attorney been ordinarily expeditious in the prosecution of the appeal, and the Courts likewise, the sentence originally imposed upon petitioner would have been served long before the filing of this petition.

This petition is presented in good faith. If determined adversely to petitioner, he will *begin* to serve his sentence at least two years after his discharge on habeas corpus.

He has been prejudiced by delay.

CONCLUSION.

The conflict of decisions between that of the United States Circuit Court of Appeals necessary to invoke the jurisdiction of the Court has been shown.

In view of the undeniable laches of the United States Attorney, the case is not one in which the Appellate Court should have groped for an exception to the general rule in its attempt to distinguish the instant case. There was no occasion for any relaxation of a strict construction of Section 230, U.S.C.A.

Regardless of this attempt, the Appellate Court has proclaimed the *Steffler* case, supra, the law of the Ninth Circuit as opposed to the *Matton Steamboat*

case, decided later, and adopted in the Rules of this Court.

Laches has been shown.

The United States Attorney exercised unseasonable delay in taking the appeal and outrageous and inexcusable delay in prosecuting it.

The Courts have ignored the principle of promptness in habeas corpus proceedings, established by judicial decision, and extended to all appellate proceedings by rules of Court, thus departing from the accepted and usual course of judicial proceedings.

With respect to the doctrine of laches, there is also presented a conflict between the decision of the Appellate Court in the instant case and that of the *Rempas* case, supra.

We submit that regardless of its final decision, this petition should be granted on both grounds presented for invoking this Court's jurisdiction, in order to clarify the construction of Section 230 U.S.C.A., which the decision of the Appellate Court has confused, and to give the Federal Rules of Civil Procedure some "meaning and affect". (*Rempas* case, supra.)

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court, on a day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Ap-

peals in the said case therein, entitled, James H. Patterson, United States Marshal for the Territory of Alaska, Third Division, and Oscar Olson, Deputy United States Marshal for the Territory of Alaska, Third Division, Appellants, v. Pete Jones, Appellee, No. 10,536, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code, Section 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court. And your petitioner will ever pray.

Dated, Anchorage, Alaska,
September 15, 1944.

GEORGE B. GRIGSBY,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I prepared the foregoing petition as counsel for the petitioner named therein; that to the best of my knowledge the said petition is well founded, and that it is interposed in good faith and not for purposes of delay.

Dated, Anchorage, Alaska,
September 15, 1944.

GEORGE B. GRIGSBY,
Counsel for Petitioner.

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612503—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 474

PETE JONES, PETITIONER

v.

JAMES H. PATTERSON, UNITED STATES MARSHAL FOR THE TERRITORY OF ALASKA, THIRD DIVISION, AND OSCAR OLSON, DEPUTY UNITED STATES MARSHAL FOR THE TERRITORY OF ALASKA, THIRD DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals denying petitioner's motion to dismiss the appeal (R. 70–76) is reported at 141 F. (2d) 319. The court's opinion on the merits (R. 78–83) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 22, 1944 (R. 84). The petition

for a writ of certiorari was filed September 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the application for allowance of an appeal to the circuit court of appeals was "duly made" within three months after entry of the judgment of the district court.

2. Whether the circuit court of appeals erred in denying the motion to dismiss the appeal on the ground of laches.

STATUTE INVOLVED

Section 8 (c) of the Act of February 13, 1925, as amended (28 U. S. C. 230), provides:

> No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

STATEMENT

On October 17, 1942, petitioner filed a petition for a writ of habeas corpus in the District Court of the United States for the Territory of Alaska, Third Division, alleging that he was illegally restrained of his liberty under a judgment sentencing him to imprisonment for six months, entered against him on October 15, 1942, in the United

States Commissioner's Court of the Precinct of Anchorage, Alaska, Third Division; that the judgment was based upon his conviction for the crime of maintaining a gambling place contrary to Section 3, Chapter 56, of the Session Laws of Alaska, 1919 (Sec. 4985, Compiled Laws of Alaska, 1933); and that that statute was void as having been passed by the legislature of the Territory of Alaska in violation of Section 9 of the 1912 Organic Act of Alaska (37 Stat. 512, 514–515) (R. 2–4). A writ of habeas corpus issued (R. 4–6) and respondents filed a return thereto which denied the allegations of the petition and recited that petitioner had been confined under the judgment of the United States Commissioner's Court from October 15 to October 17, 1942, having on the latter date been released on bail pending a hearing on the writ of habeas corpus (R. 9–11; see also R. 5, 6–7). Petitioner filed a demurrer to the return (R. 13) and a hearing thereon was held on October 27, 1942 (R. 11–12).

The district court subsequently sustained the demurrer (R. 12) and filed findings of fact and conclusions of law (R. 14–17) in which it concluded that Section 3, Chapter 56, of the Session Laws of Alaska, 1919, was void as interfering with or attempting to limit an act of Congress to prevent and punish gambling, in violation of Section 9 of the Organic Act of Alaska. The court accordingly entered judgment exonerating peti-

tioner's bail and ordering that petitioner be discharged (R. 17–18). Respondents appealed, and petitioner moved to dismiss the appeal on the grounds that respondents' application to appeal was not timely made (R. 72) and that respondents had been guilty of laches in prosecuting their appeal (R. 65, 76). The circuit court of appeals filed an opinion denying the motion (R. 70–76) and later rendered a separate opinion on the merits reversing the judgment of the district court (R. 78–83).

Petitioner urges as one of the grounds of his petition for a writ of certiorari that the appeal to the circuit court of appeals was not taken in time. The relevant facts in respect of this question may be summarized as follows:

The judgment of the district court, rendered by Judge Hellenthal of the third division, was entered on November 5, 1942 (R. 17–18). The petition for allowance of appeal, together with the necessary accompanying papers, was filed with the clerk of the district court, third division, at Anchorage, Alaska, on January 29, 1943, within a period of three months from the date of the judgment. Service of copies of these papers was made on petitioner's counsel on January 28, 1943. (R. 18–23, 27, 30–31.) Finding that Judge Hellenthal was absent from Anchorage, the United States Attorney on January 29 unsuccessfully attempted to send the papers by plane for presentation to Judge Hellenthal at Juneau, Alaska (R.

25–26, 27–28, 31–32). The papers, together with a showing that Judge Hellenthal was absent from the third division (R. 41–42), were subsequently submitted to Judge Pratt, judge for the fourth division of the district court, at Fairbanks, Alaska (R. 28, 32–33, 40). On February 2, 1943, Judge Pratt entered an order referring the matter back to the third division on the ground that Section 8 (c) of the Act of February 13, 1925, *supra,* had been complied with and there was therefore no necessity for him to act on the petition for allowance of appeal (R. 41–42). The appeal papers were then returned to, and a copy of Judge Pratt's order was filed with, the clerk of the third division (R. 29, 40). Judge Hellenthal, who returned to the third division on February 21, 1943 (R. 33), which was subsequent to the expiration of the appeal period, formally allowed the appeal on April 13, 1943 (R. 38–39), after the matter had been brought to his attention several times previously (R. 25, 29, 34, 36–37).

ARGUMENT

1. Petitioner does not here challenge the validity of his conviction.[1] Rather, relying on the rule of *Matton Steamboat Co.* v. *Murphy,* 319 U. S. 412, he contends (Pet. 7–19) that the appeal to the

[1] Hence, we do not discuss that question. If the question were open, we think that the opinion of the circuit court of appeals (R. 78–83) amply demonstrates that petitioner's conviction was not invalid.

circuit court of appeals, which was governed by Section 8 (c) of the Act of February 13, 1925 (*supra,* p. 2),[2] was not taken in time because the application for allowance of the appeal was not presented to the judge who signed it within three months after entry of the judgment of the district court. However, a timely application for allowance of the appeal was made to the district court, as distinguished from a judge thereof; petitioner's contention is therefore without merit.

Regardless of any doubts which may have previously existed (cf. *Von Holt* v. *Carter*, 56 F. (2d) 61 (C. C. A. 9); *Baez* v. *People of Puerto Rico,* 82 F. (2d) 317 (C. C. A. 1)),[3] it is now settled that an appeal to the circuit court of appeals under Section 8 (c) may be allowed by either the

[2] In Paragraph 2 of the note to Rule 1 of the Federal Rules of Civil Procedure, which authorize the taking of an appeal in a habeas corpus proceeding by filing a notice of appeal (see Rules 73 (a) and 81), the Advisory Committee states that the Rules do not extend to the District Court for the Territory of Alaska. Cf. 48 U. S. C. 646 and 873a, in which Congress made the Rules applicable to the District Courts of the United States for Hawaii and Puerto Rico. There is no similar enactment with reference to Alaska.

[3] In the light of the *Steffler* decision, cited in the text, the dictum in the earlier *Baez* case, *supra*, upon which petitioner relies (Pet. 8–9, 10–13), that the timely filing of an application for allowance of an appeal in the office of the clerk of court is not an application "duly made" within the meaning of Section 8 (c) of the Act of February 13, 1925, is an inaccurate statement of the law in respect of those cases where the application is made to the court by filing it with the clerk of that court.

district court or a district judge and that when application is made to the court, it is timely if it is filed with the clerk of the court within three months after entry of the judgment of the district court. *Steffler* v. *United States,* 319 U. S. 38, 40. It is equally well settled that if application to the court or to a judge is made in time, it is immaterial that the order allowing the appeal was not signed within the appeal period, for otherwise "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control." *Reconstruction Finance Corp.* v. *Prudence,* 311 U. S. 579, 582; see also *Matton Steamboat Co.* v. *Murphy, supra.*

Tested by these principles, it is not open to doubt that the appeal in this case was taken in time. The application for appeal, together with the accompanying papers, was directed to the court (see R. 19–20), it was filed with the clerk of the court on January 29, 1943, within the appeal period, and it was thereafter allowed by the court, through Judge Hellenthal (see *supra,* pp. 4–5). Since the application was appropriately made to the court, the rule of the *Matton Steamboat* case that timely application must be made to the judge who allows the appeal is not here apposite. Rather, to adapt that rule to the situation where application is made to the court, it is plain that if, as in this case, timely application is made to

the court which allows the appeal, it has been "duly made" within the meaning of Section 8 (c) of the Act of 1925.

2. Petitioner also urges (Pet. 19–35) that the court below erred in refusing to dismiss the appeal on the ground of laches by respondents in filing the record and docketing the cause in that court. Since, however, the record was filed and the cause docketed within the time fixed by order of the court below, it is clear that petitioner's contention is without substance.

The appeal was allowed on April 13, 1943 (R. 38–39), and the citation was issued on April 29 (R. 43–45). Thereafter, upon appropriate applications, the district court and Judges Wilbur and Garrecht of the circuit court of appeals extended for approximately ninety days the time for filing the record and docketing the cause (R. 45–46, 47–49, 52–53, 57–58). The record was filed before the expiration of the last extension (R. 58). It shows no facts indicating purposeful dilatoriness on the part of respondents in seeking these extensions and several of the orders extending the time for filing and docketing recite that they were made for good cause shown. In these circumstances, petitioner having failed to show any substantial prejudice by the extensions, we submit that the court below properly denied the motion to dismiss the appeal on the ground of laches.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
IRVING S. SHAPIRO,
Attorney.

OCTOBER 1944.

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